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November 30, 2020

The Honorable Jeff Leach
House Committee on Judiciary & Civil Jurisprudence
Texas State Capitol
P.O. Box 2910
Austin, Texas 78711

Re: Notice of Formal Request for Information

Dear Chairman Leach,

The Texas Construction Association (TCA) respectfully provides the comments below in response to the Request for Information related to Interim Charge 1. These comments are intended to supplement joint comments submitted by TCA, the Associated Builders & Contractors (ABC) and the Associated General Contractors (AGC-TBB).

Interim Charge 1: Monitor the agencies and programs under the Committee's jurisdiction and oversee the implementation of relevant legislation passed by the 86th Legislature. Conduct active oversight of all associated rulemaking and other governmental actions taken to ensure intended legislative outcome of all legislation, including the following:

HB 2899, which specifies that highway construction contractors are not liable for design defects. Investigate whether expansion of those policies to other areas of public/private contracting is in the best interest of the state.

As stated in our joint comments, TCA supports the expansion of the *Spearin* doctrine that construction contractors are not liable for design defects, to all classifications of construction. During the 86th legislative session, TCA had the opportunity to provide live testimony to the Committee in support of this position and H.B. 2901.

TCA member, Carmen Smith with NTD Mechanical in Dallas testified about a specific public project wherein the design documents ordered the use of “Blue Duct” – a specific material that had precise installation requirements – so much so that NTD had to fly the manufacturer’s representative to DFW to be at the jobsite on the day of installation. During installation, the general contractor revealed the intent to pack the soil above the ductwork to 60,000 pounds; this exceeded the manufacturer’s specifications and the general contractor was told so. However, the general contractor was adamant about following the design documents provided by the project owner.

Ms. Smith testified that if she had refused to install the Blue Duct at the insistence of the general contractor, she would have been notified that she was in breach of her contract and the general contractor would have been within his rights to hire another contractor to complete the work, at NTD's expense. Therefore, stuck between a rock and a hard place, the duct was installed, the ground was packed and the duct collapsed. Because of the current Texas law, Ms. Smith knew she could be sued for the collapsed ductwork, therefore, she made the decision to dig up the duct and replace it with the appropriate product, entirely at her expense.

Ms. Smith noted that this experience was just one in a long line of jobs where a contractor finds itself in an untenable position. Contractors such as NTD want to be able to point out potential design defects, however, often in Ms. Smith's experience, the general contractor or architect fails to pass on request to the mechanical engineers or she is accused of practicing engineering without a license. Ms. Smith concluded her testimony by noting that the current law fails by creating an adversarial process for construction; correcting the law will foster a more collaborative work environment, resulting in better construction.

The current law was adopted in 1907 when the Texas Supreme Court ruled against the contractor in *Loneragan v. San Antonio Loan & Trust Co.*, 104 S.W. 1061 (Tex. 1907). However, there have been countless changes in the construction industry which have led 48 other states to adopt the *Spearin* doctrine. Texas should follow suit. A contractor should not be liable for construction that is defective due to erroneous design documents furnished to the contractor by the owner. This is as true for all contractors as it is for highway construction contractors, therefore the 87th Legislature should expand the *Spearin* doctrine in H.B. 2899 accordingly.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jennifer Fagan', with a stylized, cursive script.

Jennifer Fagan
Vice President Government Affairs